Kluwer Arbitration Blog

ICCA Sydney: Building Better Arbitration Proceedings – Practical Suggestions I: Revisiting Conventional Wisdom in the Organization of Arbitral Proceedings

Jonathan Mackojc (Corrs Chambers Westgarth) · Wednesday, April 18th, 2018 · Young ICCA

The morning session at ICCA Sydney Conference 2018 on "Revisiting Conventional Wisdom in the Organization of Arbitral Proceedings" was moderated by *Chiann Bao* and had the insightful contributions of *Funke Adekoya SAN, Dr. Fuyong Chen, Klaus Reichert SC* and *Prof. Nayla Comair-Obeid*.

Chiann Bao insisted that we ought to deal with issues of procedure by firstly examining the existing structure and questioning whether the current system is wise. Chiann Bao broadly suggested that the following three questions must be considered if we are to unpack the notion of 'conventional wisdom':

1. What are we actually organising and what are we seeking to achieve?;
2. What influences conventional wisdom?; and
3. Are there any aspects that should be revisited?

What are we actually organising and what are we seeking to achieve?

Klaus Reichert SC asserted that both the tribunal and parties must share a common understanding of the object and purpose of the arbitration, to avoid a costly and unsatisfactory outcome. The key contention was that disputes are not settled by procedures, but rather relief that is granted by the tribunal. It was noted that most experienced arbitrators commence by reading the prayers for relief, and then work their way back to the beginning of the statement of claim or defence. This is particularly important as the tribunal does not (or at least ought not) have full jurisdiction over parties, as it is restricted to jurisdiction over prayers for relief. The absence of a wide-ranging jurisdiction renders statements such as '…further or other relief which the tribunal may award' superfluous and thus meaningless.

Klaus Reichert SC offered a simple yet powerful solution: immediately after the tribunal is constituted, it must inform parties that they ought to carefully consider prayers for relief as any request to widen the scope at a later stage may be denied by the tribunal. Promoting a strong foundation at the outset will almost always guarantee

a smooth process.

What influences conventional wisdom?

Chiann Bao referred to John Kenneth Galbraith OC's thoughts on conventional wisdom as a starting point. Prof. Nayla Comair-Obeid's interpretation of the term suggests that it represents a set of good practices and principles, passed down from the current generation of arbitration practitioners to the emerging generation. Prof. Nayla Comair-Obeid also noted that international arbitration has developed significantly, yet not solely in response to technological developments. Recent changes can also be attributed to developments in investor-state arbitration which demand constant adaption to a changing environment. Ultimately, as cases are specific in nature, the arbitration community may be permitted to deviate from conventional wisdom.

Funke Adekoya SAN suggested that we go a step further than Galbraith's definition of conventional wisdom and consider material which is readily available such as the UNCITRAL Notes on Organizing Arbitral Proceedings. It outlines common practice with respect to key procedural issues, and seeks to addresses power imbalances between experienced and inexperienced parties. However, it is important to note that it is merely a guide. Klaus Reichert SC shared this view, and suggested that even if uniform principles exist, people will inevitably interpret them differently. The only safeguard is sufficient dialogue, within the arbitral tribunal and among parties, as to how these principles are to be interpreted.

Dr. Fuyong Chen urged us to revisit conventional wisdom from time-to-time, and according to different perspectives, to ensure that we remain sensitive to certain cultural issues which equally influence the development of international arbitration. In the case of China, these include the restrictions on ad hoc proceedings, the use of Med-Arb, and the importance of witnesses.

Klaus Reichert SC referred back to Galbraith's definition of conventional wisdom, noting that it suggests it may change at any time. This has recently been observed, particularly where certain (and often new) arbitration stakeholders are on the look out for the next sound bite, tweet, or conference topic. Such an approach disregards fundamental points of organisation and conventional wisdom. Klaus Reichert SC also highlighted that the arbitration community is currently obsessed with the 'arrogance of internationalism' – where just because one arbitral institution adopts a certain procedure or initiative, others must follow suit.

Are there any aspects that should be revisited?

The panel's list included: online arbitral proceedings, word limits for submissions, front-loading the arbitral process, common understanding of definitions relating to evidence, whether cases should be allowed to 'breathe', and considering the 'essential, desirable, superfluous' award. The panel agreed that the first seemed to be the most relevant at present.

Other Considerations

- The panel agreed that the role of the tribunal secretary must be examined further,

particularly whether delegating legal research to the secretary suggests misconduct (as it may be considered an element of 'decision-making'); and
• Prof. Nayla Comair-Obeid's call to action – experienced practitioners must involve emerging practitioners in arbitration prayer meetings and that this is not a choice but rather a duty.

To make sure you do not miss out on regular updates on the Kluwer Arbitration Blog, please subscribe here.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Wednesday, April 18th, 2018 at 2:43 am and is filed under Arbitral Tribunal, Arbitration, Arbitration Proceedings, ICCA Sydney 2018
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.